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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 378

HARLEY BLAYLOCK and MARION L. BLAYLOCK,
Petitioners,

vs.

THE STATE HIGHWAY COMMISSION OF THE STATE OF KANSAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR THE STATE HIGHWAY COMMISSION OF KANSAS IN OPPOSITION

WILLIAM M. FERGUSON,
Attorney General of Kansas,
Statehouse,
Topeka, Kansas,
CHARLES N. HENSON, JR.,
Assistant Attorney General,
State Office Building,
Topeka, Kansas,
JERRY W. HANNAH,
New England Building,
Topeka, Kansas,
Attorneys for Respondent.

E. L. MENDENHALL, INC., 1105 Oak Street, Kansas City 6, Mo.; HArrison 1-3030

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas (Pet. App. A10-A18) is reported at 191 Kan. 187, 380 P.2d 337. The trial court's opinion (Pet. App. A5) is not reported.

JURISDICTION

The judgment of the Supreme Court of Kansas was entered April 6, 1963. A petition for rehearing was denied on May 10, 1963, and the Petition for Certiorari was filed on August 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

QUESTIONS PRESENTED

1. Whether a federal question is present when the highest court of a state decides the state's restriction of abutters to indirect access (frontage roads) on a newly constructed limited access highway constitutes no taking of a compensable property right.

2. Is a claimed violation by a state of the "just compensation" provision of the 5th and 14th Amendments properly before this Court, when the highest court of a state did not consider or rule on that question because the argument was not properly presented to that court in relation to the constitutional guarantee?

3. Whether a federal question of due process is presented by the construction of an ambiguous contract in the Supreme Court of Kansas, when the record fails to establish the argument was raised in that court.

STATEMENT

In October, 1959, the petitioners, lessees of a truck stop restaurant near Olathe, Kansas, abutting Interstate Highway 35, brought suit against The State Highway Commission of Kansas for a mandatory injunction requiring

it to provide direct access from petitioners' leased property to the main traveled northbound lane of the Interstate Highway, or, in the alternative, that The State Highway Commission be required to compensate plaintiffs in damages. The case was tried in the District Court of Johnson County, Kansas, and petitioners obtained a substantial jury verdict. On appeal, the judgment of the trial court was reversed. A motion for rehearing was denied, and this Petition for Certiorari was filed.

The trial court made findings that abutters have no pre-existing right of access to a restricted access highway constructed on a new location. (Pet. App. A8)

> "The Court finds that the right of way for the new Highway I-35 adjacent to the leasehold interest of the plaintiffs was acquired by condemnation in 1949. That in said condemnation action the State Highway Commission did not acquire any existing rights of access as this is a new highway and no rights were in existence at the time; and that in addition to the ground acquired the Highway Commission with or without legislative authority did acquire the right to control and regulate entrances or access facilities to the main traveled portion of such Inter-State Highway. (See Paragraph 5C of the petition.)"

In acquiring the right of way for the construction of this highway on a new location, the affected abutting landowners were clearly apprised of the character of the new highway. (Respondent's App. Page A1).

Prior to the original condemnation of the right of way acquired in accordance with the above conditions, the respondent designated the highway on a new location as part of the state highway system to be constructed under joint agreement between the Federal Bureau of Public Roads and The State Highway Commission of the State

of Kansas. The Commission began construction of the controlled access highway in segments on the right of way acquired. In 1952, a two-lane ribbon connecting Olathe and Kansas City, Kansas, was completed, and by April 7, 1958, the second two-lane ribbon and a frontage or service road were completed and opened on the same right of way. During the period of construction, and in 1952, a Highway Entrance Permit (Pet. App. A1), was issued to petitioners' lessor. Direct driveways were installed to the single ribbon which had been completed at that time. This ribbon is now the northbound lane of Interstate Highway 35.

In March, 1956, petitioners obtained a ten year lease on the property in question, and it is this lease upon which they based their claim to damages.

After completion of the entire highway, including the frontage roads, on April 7, 1959, The State Highway Commission changed petitioners' means of access by removing the driveways between the frontage road and the main-travelled lanes of the highway, which left the petitioners access to the frontage road, leading to the main-traveled lanes of the highway by an indirect route.

The trial court, holding that the petitioners had no property right of direct access following the original condemnation, also held they did obtain a property right of access by virtue of the Highway Entrance Permit, and permitted the case to go to the jury on the question of damages to the leasehold estate by virtue of their subsequent restriction to a frontage road. Petitioners received a verdict for damages.

The Supreme Court of Kansas, in its opinion (Pet. App. A10-A18) held that the Highway Entrance Permit (Pet. App. A1) was an ambiguous document which conveyed no property right to petitioners. By its silence,

the appellate court impliedly affirmed the trial court on the petitioners' cross-appeal from the trial court's ruling that the petitioners had no property right of direct access following the original condemnation and highway construction.

In reversing the trial court on respondent's appeal, the Supreme Court of Kansas emphasized the rule of law that an ambiguous document requires judicial construction in favor of the public. (Pet. App. A16) The Court's opinion also points out that the landowners, through which petitioners gained their rights, took no appeal in the original condemnation action wherein they were given notice that control of abutters' access was established. (Pet. App. A17-A18)

REASONS WHY CERTIORARI SHOULD BE DENIED

1. The central question is whether any substantial federal question is presented when the highest Court of a state determines that no compensable property right has been abridged by the restricting of direct access to an Interstate Highway constructed on a new location. Federal courts, since *Erie R. Company* v. *Tompkins*, 304 U.S. 64 (1938), in determining ultimate federal questions, find a duty to follow state court decisions of substantive character, upon questions which are preliminary, incidental, or collateral to the ultimate federal question. *Herrmann* v. *Rogers*, 358 U.S. 332 (1959). Even before the *Erie* case, this Court stated that the meaning of state statutes and rules of unwritten law of a state affecting within the state are peculiarly of local law, determination of which by state courts will ordinarily be followed by federal courts. *Hines, Trustee*, v. *Martin*, 268 U.S. 458 (1925)

Petitioners, in citing *Donovan v. Pennsylvania Company*, 199 U.S. 279 (1905) (Pet. Brief—7), developed the substantive law of Illinois on the question of access rights in 1905. Respondent doubts the probative effect of this authority on the substantive law of Kansas today.

Petitioners rely on *Martin v. Creasy*, 360 U.S. 219 (1959), to obtain their writ here. There, the Federal District Court for the Western District of Pennsylvania enjoined the construction of a limited access highway where there was no provision for compensation of access rights. This action was reversed by this Court, for the reason that an injunction was premature. The dicta of this opinion quoted in Petitioners' Brief (pp. 6-7) merely serves notice that a landowner might appeal if, after conclusion of his condemnation case, it is found that he has been deprived, without due process of law, of property rights as established in accordance with the law of Pennsylvania.

The substantive law of Kansas is firmly established to the effect that an abutting landowner to a newly constructed limited access highway has no pre-existing property right of access (to that highway) and therefore such right need not be acquired by the respondent. The distinction between acquiring the pre-existing access to an existing highway and the initial restriction of access to a new highway built where no highway previously existed is set out in *Radke v. State Highway Commission*, 184 Kan. 605, 339 P.2d 301, at page 312:

> "While G.S. 1957 Supp. 68-1903, authorizes the commission to acquire private or public property or property rights, including rights of access, by condemnation, in the same manner as now or hereafter authorized by law for acquiring property or property rights in connection with highways, we think the legislature only intended that power to be invoked

to acquire previously existing rights of access when an existing conventional highway is widened and improved as a controlled access facility (G.S., 1957 Supp., 68-1904). In that situation there is a taking of an existing right under the power of eminent domain for which the owner must be compensated (*Simmons* v. *State Highway Commission*, *supra*). *Where, however a new highway is established by the commission as a controlled access facility through land where no highway previously existed, and the right of access is restricted by exercise of the police power, the abutting owner is not entitled to compensation for the restriction of that right.* Generally speaking, damage resulting to property through the exercise of the police power is not compensable (*Mugler* v. *Kansas*, *supra*)." (Our emphasis)

In *Moore* v. *State Highway Commission*, 191 Kan. 624, 383 P.2d 540, the Court approved the rule of the *Riddle* case. At page 628, the Court states as follows:

"It seems well settled that where a new highway is established by the commission as a controlled-access facility through land where no highway previously existed, and the right of access is restricted by exercise of the police power, the abutting landowner is not entitled to compensation for the restriction of that right nor is he entitled to enjoin the commission from restricting his access thereto."

It is well established that where decisions of the highest court of a state are not uncertain, confusing or in conflict, the federal courts are bound by the law of the state as promulgated by the highest court of the state. *Williams* v. *Conger*, 125 U.S. 397 (1888); *Messenger* v. *Anderson*, 225 U.S. 436 (1912); *Erie R. Company* v. *Tompkins*, *supra*.

2. Petitioners' brief filed in the Supreme Court of Kansas did not raise the constitutional question concerning

the taking of property without the payment of just compensation. Accordingly, the opinion of the Supreme Court of Kansas (Pet. App. A10-A18) did not consider or rule upon that question because argument was not properly presented to that Court in relation to that constitutional issue. It is basic that the failure to raise a constitutional issue in the trial court, the State Supreme Court, or on motion for rehearing in the latter court constitutes a waiver. It was through this same process that the defendant waived his "equal protection" contention in *Beck* v. *Washington*, 369 U.S. 541 (1962); there this Court stated at page 553:

> "Assuming arguendo that for the purposes of our jurisdiction the question would have been timely if raised in a petition for rehearing, not having been raised there or elsewhere or actually decided by the Washington Supreme Court, the argument cannot be entertained here under an unbroken line of precedent. (citations)"

The Kansas Court's opinion did not discuss the cross-appeal, but confined itself to the construction of the entrance permit. This Court has stated it will not decide issues which form no part of the opinion below. *United States* v. *Howard*, 352 U.S. 212 (1957).

The Kansas Court's opinion rests on a non-federal ground; *i. e.*, the construction of the ambiguous entrance permit. It is now established that this Court is without jurisdiction to review a judgment of a state court when the existence of an adequate state ground is debatable. *Stembridge* v. *Georgia*, 343 U.S. 541 (1952); *Ellis* v. *Dixon*, 349 U.S. 458 (1955).

When petitioners failed to raise the constitutional issue in their specifications of error (App. *infra* A3), and in

their brief in the Kansas Supreme Court, they abandoned the same for the purposes of their cross-appeal.

3. The Kansas Court held the Highway Entrance Permit (Pet. App. A1) given to petitioners' lessor in 1952 by the respondent to be an ambiguous document. It is clear that the early provisions of the document are in conflict with paragraph 10. Petitioners contend the Kansas Supreme Court denied them due process by its construction of the ambiguous document, arguing that it was done in a manner contrary to prior settled law of the jurisdiction. The *Erie Railroad* case (*supra*) settles the question of power, and denies the federal court the right to decline to follow the state's decisions upon interpretations of contract. It is well established that the federal court, in passing on the validity or construction of contracts, is bound by the substantive law of the state. *Six Companies v. Joint Highway District Number Thirteen*, 311 U.S. 180 (1940).

Respondent invites particular attention to one paragraph of the opinion below at page 191 (See Pet. App. A17):

> "Thus the court is of the opinion that the permit did not clearly give plaintiffs a permanent access to the northbound lane, but was intended to give only a temporary right of access until the defendant Commission constructed frontage roads or provided other means of ingress and egress from the main traveled way to the property of the plaintiffs. This construction of the permit is fortified by the leasing agreement between the lessors and the plaintiffs (lessees) wherein they recognized the temporary nature of the permit by the following language:
>
> "In event the present entrances are removed and providing the state in building the service road

leaves no access to the property, the rent will not be charged for the time traffic is cut off.' "

In addition, the Court made certain observation of authorities on the following propositions:

(a) That an ambiguous instrument purporting to convey a property right requires judicial construction in favor of the public. Petitioners contend this rule to be completely contrary to the law of all jurisdictions, but Respondent finds otherwise. See 12 Am. Jur., *Contracts*, Sec. 254:

> "AGREEMENT AFFECTING PUBLIC.—Where the state is concerned, as in other cases, language is to be given, if possible, its usual and ordinary meaning. However, where the words employed are fairly susceptible of more than one interpretation, agreements affecting the public and agreements with the public are interpreted in favor of the public."

(b) The law of Kansas precludes the state from being bound on contract, absent consideration, on the theory of estoppel. *State ex rel.* v. *Paul and Grice*, 143 Kan. 412, 214 Pac. 425; *City of Hutchinson* v. *White*, 117 Kan. 622, 625, 23 Pac. 508.

It is submitted that the Court's construction of the patently ambiguous entrance permit-contract is in accordance with settled general legal principles and did not deny petitioners due process, as contended.

CONCLUSION

Since settled Kansas substantive law provides no property right of access for abutters on a newly constructed highway, there was no taking of a property right in this case by the construction of the controlled access

highway. It is clear the state court had no opportunity to and did not pass on the constitutional issues raised here. The construction of an ambiguous document by the highest court of a state is controlling in this Court. Since the decision below is correct and is not in conflict with any decision of this Court the Petition for Certiorari should be denied.

Respectfully submitted,

WILLIAM M. FERGUSON,
Attorney General of Kansas,
Statehouse,
Topeka, Kansas,

CHARLES N. HENSON, JR.,
Assistant Attorney General,
State Office Building,
Topeka, Kansas,

JERRY W. HANNAH,
New England Building,
Topeka, Kansas,

Attorneys for Respondent.

APPENDIX

(First Published in The Olathe Mirror, Thursday, October 6, 1949.)

Publication Notice

(Abstracted from Appellant's Supplement to Appellees' Counter Abstract—5.)

IN THE MATTER OF CONDEMNATION OF LAND IN JOHNSON COUNTY, KANSAS. No. 18188.

To: . . . Bert Gilbert and Angebelle Gilbert . . . et al.

You and each of you are hereby notified that the State Highway Commission of Kansas has instituted condemnation proceedings against certain lands owned by you in Section 1, 2, 3, 4, 6, 9, 13, 16, 17, 19, 20, 23, 24, 25, 26, 30, 31, 34, 35, and 36, Townships 12 South and 14 South, Range 23 East and 24 East, in Johnson County, Kansas, on Highway 50.

You are further notified that lands condemned herein are for the purpose of constructing an interstate highway, and that such highway will be a controlled access highway as set forth in the petition. (Our emphasis)

The Court has appointed Harry A. Wilson, Paul Stolbert and Tom Poor, three disinterested householders of this county to meet and view the lands taken for the purpose of apraising the land to be taken. Said appraisers will meet at 10 o'clock A. M. on the 9th day of November, 1949, at the office of the Clerk of the District Court at

Olathe, Kansas, to make their appraisement and assess damages, if any.

HARRY A. WILSON,
PAUL N. STOLBERT,
TOM POOR,
Appraisers.

Extract from Original Petition in Condemnation

(Taken from Appellees' Counter Abstract—43.)

5. Petitioner alleges that the Right of Way for Public Highways herein petitioned for has been designated by Federal Authority and by the Kansas State Highway Commission as a part of a National System of Interstate Highways; that in order for such highway to serve the purpose for which it is being constructed it will be necessary for the State Highway Commission to exercise certain traffic controls in order to facilitate the movement of traffic upon said Interstate Highway, and in the exercise of its police power to reduce the hazards of life and property in the interests of public safety as follows:

(a) That all existing entrances or access facilities to the traveled portion of any existing road or highway shall continue to be so used but the petitioner herein reserves unto itself the right to construct in the future an outer highway or service road within the Highway Right of Way to connect with the traveled portion of such interstate highway, and when so constructed, Petitioner reserves the right to require all abutting owners to use such outer highway or service road as means of reaching the main traveled portion of said Interstate Highway and at points to be designated by the State Highway Commission.

(b) That entrances or access facilities to be approved by the State Highway Commission will be provided the

present abutting owners to the traveled portion of highways which are being laid out for the first time, and where no highway has heretofore existed, and in the event in the future an outer highway or service road is constructed within the right of way all abutting owners will be required to use such outer highway or service road as a means of reaching the main traveled portion of said Interstate Highway and only at points to be designated by the State Highway Commission.

(c) That no additional entrances or access facilities from the property of abutting property owners to the main traveled portion of such Interstate Highway may be constructed without written permission of the State Highway Commission having first been obtained and the State Highway Commission, petitioner herein, in the exercise of its police power to control and regulate traffic, reserves the right and authority, to limit and to control the number of such access facilities and the location of the same along said Interstate Highway.

Appellees' Specifications of Error

(Taken from Appellees' Counter Abstract—48.)

1. The trial court erred in its order of November 21, 1961, allowing defendant to amend its answer to claim the defense of ultra vires.

2. The trial court erred in holding that defendant acquired the right to control and regulate entrances or access facilities to the main traveled portion of I-35 in the original eminent domain action filed in 1949.